

PUBLIC VERSION

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

Protest of	)	
	)	
Alaska Weather Operations Services, Inc.	)	Docket No. 08-ODRA-00431
	)	
Solicitation No. DTFAWA-07-R-00006	)	

**DECISION ON MOTION TO DISMISS**

**I. INTRODUCTION**

This matter is before the Office of Dispute Resolution for Acquisition (“ODRA”) on the Federal Aviation Administration’s (“FAA”) Motion to Dismiss (“Motion”) the above-captioned protest (“Protest”) filed by Alaska Weather Operations Services, Inc. (“Alaska Weather”) on January 24, 2008. The Protest challenges the FAA Air Traffic Planning and Procedures Program Directorate’s (“Program Office”) award of a contract to RNR Technologies, Inc. (“RNR”) for the performance of Contract Weather Operator (“CWO”) services at four FAA weather stations located in Alaska. RNR has intervened in the Protest pursuant to 14 C.F.R. § 17.15(a), but did not file a brief in response to the Motion.

Alaska Weather contends that it improperly was determined to be “technically unqualified” and challenges the Program Office’s evaluation of its price proposal. *See Protest* at 9. On February 21, 2008, the Program Office filed this Motion requesting summary dismissal on several grounds. Alaska Weather filed its Opposition to the Motion on March 14, 2008. For the reasons discussed below, the ODRA grants the Motion in part and denies it in part.

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### **II. FACTUAL BACKGROUND**

Solicitation No. DTFAWA-07-R-00006 (“Solicitation”) was issued as a small business set-aside, contemplating multiple contract awards for the performance of CWO services at twenty two (22) groups of weather stations located throughout the United States. The CWO contract for each group was to be awarded to the technically acceptable offeror who was responsible, conformed to all requirements of the Solicitation, had acceptable past performance and relevant experience, and offered the “lowest evaluated reasonable price” for that group. *See Solicitation, Part IV—Section M, Evaluation Factors for Award, Award Selection, § M.1.1 at M-1.* The Solicitation provided that no offeror could be awarded a contract for more than three groups of weather stations. *See id., Part I—The Schedule, Section B—Supplies or Services and Prices/Costs at B-1 through B-67.* The contract award for Group 18, which is the subject of this Protest, is comprised of four FAA weather stations located at the Alaska sites of: King Salmon; Dutch Harbor; Iliamna and Sand Point.

Following its receipt of the December 18, 2007 notification that RNR had been awarded the CWO contract for Group 18, Alaska Weather requested and was provided with a telephone debriefing by the Program Office on January 24, 2008. During the debriefing, Alaska Weather was advised that it had been rated “[DELETED]” under [DELETED]. Based on [DELETED], the Program Office explained that it subsequently determined that Alaska Weather was [DELETED] to provide the required Alaskan CWO services. In addition, [DELETED] the Program Office did not evaluate Alaska Weather’s price proposal. *See Motion at 8, n. 3.*

### **III. THE PARTIES’ POSITIONS**

#### **A. The Program Office’s Motion**

In its Motion, the Program Office first contends that the Protest summarily should be dismissed because Alaska Weather “seeks in a wholly untimely manner” to “question . . . alleged deficiencies” in the Solicitation. *See Motion at 6.* According to the Program Office, because these grounds were not raised prior to the Solicitation’s May

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7, 2007 closing date, they should be dismissed as untimely. *See Odra Procedural Regulations*, 14 C.F.R. § 17.15(a) (1); *Protest of PCS*, 01-ODRA-00184. The remaining protest grounds involve the “transition plan proposed by RNR” and the alleged failure of RNR “to achieve success” at least at one of the weather station sites. The Program Office contends that this group of challenges involves matters of post-award contract administration which the Odra has “clearly stated” it will not consider in the context of a bid protest. *See Motion at 7 citing Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183. As such, the Program Office contends that these protest grounds should be dismissed as legally insufficient pursuant to Odra Procedural Regulation 14 C.F.R. § 17.19(a) (2). *Id.*

Alternatively, and in addition to the untimeliness and legal insufficiency arguments stated above, the Program Office contends that summary dismissal is warranted in this case because Alaska Weather does not have legal standing to file the Protest. The Odra Procedural Rules only permit protests by offerors or prospective offerors “whose direct economic interest has been or would be affected by award or failure to award an FAA Contract.” *See* 14 C.F.R. § 17.3(k); 14 C.F.R. § 17.13(c); *Protest of International Services, Inc.*, 02-ODRA-00224. According to the Program Office, even “*assuming arguendo*” that Alaska Weather’s proposal were found to be technically acceptable, it would not receive contract award of Group 18 because RNR submitted the “lowest reasonable price” for those weather stations. *Motion at 8.* The Program Office asserts that, notwithstanding Alaska Weather’s challenge, because RNR’s evaluated price is lower, RNR would “still [be] entitled to the award of the contract.” *Id.*

### **B. Alaska Weather’s Opposition**

In its Opposition, Alaska Weather contends that the Program Office’s evaluation of its proposal, and the proposal submitted by RNR “cannot meet the test of being rationally supported,” *Opposition at 1*, and seeks to have the Motion “denied in its entirety.” *Id. at 18.* With respect to the timeliness issue, Alaska Weather maintains that because it was “never given notice that the contracting officer had changed” or

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that “the administration of the existing contract had been moved [from the Alaskan Region] to Washington [D.C.],” the “doctrine of equitable estoppel” precludes the Program Office from requesting a dismissal of the Protest for untimeliness. *Opposition* at 14-15.

With respect to the legal insufficiency argument presented in the Motion, Alaska Weather responds that it is not challenging the FAA’s post-award contract administration, or RNR’s implementation of the new contract. *Id.* at 8. Instead, Alaska Weather emphasizes that its “first hand” observations of RNR’s non-performance of the awarded Group 18 contract evidences that the Program Office improperly evaluated RNR’s technical proposal. *Id.* Alaska Weather also contends that it has standing to pursue its Protest because, if the Program Office’s evaluation of Alaska Weather’s and RNR’s proposals lacks a rational basis, Alaska Weather will be eligible for a directed contract award or for participation in any follow-on competition. *Id.*

## IV. DISCUSSION

### A. Standard of Review

In the ODRA process, as elsewhere, there is a strong preference for deciding cases on the merits, rather than by dispositive motion. *See Protest of Water & Energy Systems Technology Inc.*, 06-ODRA-00373. The ODRA Procedural Regulations also expressly contemplate, however, summary dismissal where a protest is clearly untimely, legally insufficient or otherwise fails to state a claim upon which relief may be had. *See* 14 C.F.R. § 17.19(a). The Regulations also specify summary dismissal where the Protester lacks standing, or where the ODRA does not have subject matter jurisdiction over the protest. *Id.* In considering this Motion for summary dismissal, the ODRA will consider the Protester’s allegations as true, view the facts in the light

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most favorable to the non-moving party, drawing any inferences in favor of that party, and will determine whether the subject allegations provide any basis in fact or law supporting possible recovery. *See OIRA Procedural Regulations* at § 17.19(b); *Protest of Northrop Grumman Corporation*, 00-OIRA-00159, *Decision on Motion to Dismiss* dated August 17, 2000.

### **B. The Protester's Challenge to the Terms of the Solicitation is Untimely**

Alaska Weather challenges several alleged deficiencies in the Solicitation. First, Alaska Weather maintains that the Solicitation was not “designed to elicit responses that would assure that . . . Congressionally mandated” human weather observation services (often referred to in the weather observation industry as “Mike-In-Hand” services) would be provided to supplement the automated weather systems at the four Alaskan weather stations.<sup>1</sup> *Protest* at 3. In addition, Alaska Weather maintains that while this procurement was reserved for competition by small business concerns, the Solicitation’s specifications were actually “premised on” and geared towards “much larger organizations” because the “kind of detail that the Program Office evaluation team seemed to have expected” from offerors “is excessive for a small operation” such as Alaska Weather. *Id.* at 8. Alaska Weather further criticizes the Solicitation because it “addresses only Air Surface Observing Systems (“ASOS”)” rather than the alternative Automated Weather Observing Systems (“AWOS”) that is reportedly in place at the Sand Point and Dutch Harbor Alaskan Weather stations. *Id.* at 4. Alaska Weather further contends that the Solicitation’s “Alternate Proposals” provision *see Solicitation*, ¶ L.18 at L-7, which provided that “alternate proposals are not

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<sup>1</sup> The FAA Authorization Act of 1994, Pub. L. No. 103-305, § 515(c), 108 Stat. 1569, 1598-1599 requires the Agency to provide weather observation services using “human observers . . . to offer real time weather information to pilots by direct radio contact” at up to “five airports” in Alaska “where terrain and conditions do not lend themselves” to being “supported solely by automated weather observing systems.” *See Protest* at 6.

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authorized” and that “any objection to any of the terms and conditions” of the Solicitation would constitute a proposal “deficiency,” precluded it [DELETED]. *See Protest* at 4. According to Alaska Weather, the effect of the “Alternate Proposals” provision on was to restrict offerors to proposing only ASOS technology. *See Protest* at 4.

The ODRA Procedural Regulation pertinent to determining the timeliness of the challenges raised against the Solicitation’s terms by Alaska Weather provides that:

Protests based upon alleged improprieties in a solicitation or a [Screening Information Request] that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.

*See* 14. C.F.R. § 17.5(a)(1).

Notably, the ODRA Procedural Regulations also encourage the immediate and summary dismissal of untimely protests by specifying that:

[a]t any time during the protest, any party may request, by motion to the [ODRA] that—(1) the protest or any portion be dismissed for lack of jurisdiction if the protester fails to establish that the protest is timely.

*See* 14 C.F.R. § 17.19(a).

The facts material to the timeliness of Alaska Weather’s challenges to this Solicitation are not in dispute. By its own admission, Alaska Weather decided to refrain from earlier challenging the alleged Solicitation improprieties outlined in its Protest allegedly because by the time it obtained a copy of the Solicitation, the “short deadline” by which it had to prepare and submit its proposal “left no time to quibble” about the Solicitation’s terms. *Protest* at 7. Since Alaska Weather was clearly aware, prior to the May 7, 2007 proposal closing date, of the Solicitation terms it now

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complains of, and since it did not file its Protest until after the proposal closing date, *i.e.* on January 24, 2008, the portion of its Protest challenging the identified terms and limitations of the Solicitation must be dismissed summarily as untimely. *See Protest of B&B Cafeteria*, 05-ODRA-00349.

There is no legal basis for the estoppel argument posited by Alaska Weather in response to the Program Office's summary dismissal request. It long has been recognized by the ODRA that under the Acquisition Management System ("AMS") there is no requirement that the FAA individually notify a prospective contractor of an acquisition. *See Protest of Boca Systems, Inc.*, 00-ODRA-00158. It also is undisputed that in this case, the Program Office first posted a draft of the Solicitation on the FAA's Contracting Opportunities Website on December 8, 2006 and subsequently posted the final version of the Solicitation on the website on March 23, 2008. *See Motion* at 3-4. The ODRA previously has held that the FAA's Internet notification of a requirement is legally sufficient to apprise a contractor of a potential competition, and that interested potential contractors such as Alaska Weather are responsible for monitoring the Internet for FAA contracting opportunities. *See Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123.

Had Alaska Weather monitored the FAA Contracting Opportunities Website, it would have discovered both Solicitation versions well in advance of its April 2007 e-mail inquiry to the contracting officers, and well in advance of the Solicitation's May 7, 2007 closing date. Given these circumstances, Alaska Weather's contention rings hollow and does not support invoking the doctrine of equitable estoppel. Moreover, any objection Alaska Weather had to the date of its receipt of the Solicitation should have been raised with the Program Office prior to the Solicitation's May 7, 2007 closing date. By its own admission, Alaska Weather could have, but chose not to, request an extension of the proposal submission deadline. *Protest* at 7. Even more significantly, Alaska Weather managed to successfully submit a timely proposal by the Solicitation's scheduled closing date. Alaska Weather's post-award challenge against the Program Office's failure to earlier provide the Solicitation to Alaska Weather has no basis in fact or law. *See B&B Cafeteria, supra*.

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### C. Alaska Weather's Challenges Against the Technical Evaluations Present Justiciable Issues

As noted above, Alaska Weather also protests the [DELETED] technical [DELETED] its proposal received for [DELETED]. *Protest* at 10. With respect to its [DELETED], Alaska Weather reports that its proposal presented a detailed description of each site's proposed [DELETED] of each weather station. *Id.* at 12. While the Program Office reportedly found that the "description of [DELETED]" in Alaska Weather's proposed [DELETED], Alaska Weather explains that its approach was based on the unique [DELETED]. *Id.* As an example, the Program Office's debriefing team reportedly suggested [DELETED]. *Id.* Alaska Weather asserts, however, that given the [DELETED]. *Id.* at 13. Alaska Weather also disputes as "flatly wrong" the Program Office's "assertion" that Alaska Weather's proposed [DELETED]. *Id.* According to Alaska Weather, this information "was clearly spelled out" in its proposal, and is identified in its Protest by proposal volume and page number. *Id.*

In challenging the "[DELETED] rating" awarded for [DELETED] Alaska Weather maintains that [DELETED] was explicitly outlined in its proposal. *Id.* at 14-16. According to Alaska Weather, its proposed [DELETED]—and further explained that [DELETED] at each of the four Alaska sites. *Id.* Finally, Alaska Weather reports that since its [DELETED] set forth cogent descriptions of the company's specific [DELETED], including detailed [DELETED], the "[DELETED]" rating awarded for Alaska Weather's alleged failure [DELETED] "is, at best, fatuous." *Id.* at 14-15.

With respect to the "[DELETED]" technical rating assigned to its [DELETED] Alaska Weather asserts that during the debriefing, the Program Office recanted most of its criticisms and conceded that Alaska Weather's proposal had in fact [DELETED]." *Id.* at 16-17. Even so, Alaska Weather reports that the Program Office unreasonably justified the "[DELETED]" rating for this technical factor by claiming that the proposal had [DELETED] [weather station] [DELETED]." *Id.* In contravention of this justification, Alaska Weather emphasizes that its proposal included the [DELETED] which [DELETED]." *Id.*



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As a final matter, Alaska Weather disputes the Program Office's finding that its proposed [DELETED]. *Protest* at 17. According to Alaska Weather, the "debriefing team was unable to explain what additional [information] would be necessary" to render its [DELETED] acceptable. *Id.* To that end, Alaska Weather maintains that [DELETED]. *Id.* In addition, relying on the [DELETED] description described in its proposal, Alaska Weather asserts that because it proposed [DELETED] Alaska Weather's proposed "[DELETED] could, in fact, be achieved by [DELETED]." *Id.* at 18.

Alaska Weather also challenges the Program Office's technical evaluation of RNR's proposal. First, Alaska Weather alleges that that RNR "may not be technically qualified to perform the contract." *Protest* at 18. Although it has "not had access to the [RNR] proposal," Alaska Weather nevertheless concludes that "several deficiencies may be present" in RNR's proposed technical approach based upon Alaska Weather's first-hand observations of RNR's post-contract award performance of the CWO services. *Id.* For example, Alaska Weather reports that when RNR [DELETED]. *See Opposition* at 8. Alaska Weather also reports that RNR sent a [DELETED] site that [DELETED]. *Id.* Alaska Weather further reports that RNR was [DELETED] and therefore has not yet [DELETED]. *Id.* at 8-9.

While the Program Office contends that these disagreements with the Program Office's technical evaluations of RNR actually involve post-award contract administration matters, Alaska Weather responds that these are not matters "of contract administration" but instead constitute "a demonstration that the RNR [DELETED] could not rational[ly] have be[en] found to be adequate." *Id.* at 8. Alaska Weather further avers that RNR's proposal "could not have provided an adequate plan for the [DELETED] because [RNR's proposal] could not have demonstrated an understanding of the [DELETED] and [DELETED]. *Id.* at 8-9. In

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summary, Alaska Weather contends that RNR submitted a proposal “with no understanding of the unique requirements for Alaskan weather” stations and CWO services “in general” or “for the special requirements [DELETED] and that these technical deficiencies which are evident from its post-contract award performance likely reflect a subpar technical proposal. *Id.* at 9.

To the extent these particular protest contentions purport to challenge the Program Office’s post-award administration of the RNR contract, they are not justiciable in the context of a bid protest. *See Protest of Washington Consulting Group*, 98-57-00059. However, the ODRA views the crux of these allegations as challenging the conclusion of the Program Office evaluators that RNR’s proposal was technically acceptable. As such, they present a legitimate ground of protest and a basis for further adjudication. *See Protest of EnRoute Computer Solutions*, 02-ODRA-00220; *Protest of Metro Monitoring Services, Inc.*, 97-ODRA-00047.

Notwithstanding the ODRA’s conclusion on this ground of protest, it must be emphasized that Alaska Weather will bear the burden of proving that the technical evaluation of RNR lacked a rational basis, was arbitrary or capricious or reflected an abuse of discretion by the Program Office. *See Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, 02-ODRA-00250, -00251, -00252, and -00254.

### **D. The Program Office’s Motion Has Not Demonstrated As A Matter of Law That Alaska Weather Is Not An Interested Party**

The Solicitation specified that for the price evaluation, the Program Office would “determine the reasonableness of the offeror’s proposed prices for the base period” and the four option years. *Id.*, *Price Evaluation*, § M.6 at M-5. According to the Solicitation, each offeror’s price would be evaluated as reasonable if it did “not exceed that which a prudent person would pay in the conduct of a competitive business.” *Id.* The Solicitation further provided that price would “not be scored in the evaluation of proposals.” *Id.*

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According to Alaska Weather, its submitted pricing proposal was “competitive.” *Protest* at 9. In contrast, Alaska Weather alleges that RNR’s proposed price “left [out] important costs that are covered in” the Alaska Weather pricing proposal. *Protest* at 19. For example, Alaska Weather contends that the [DELETED] in performing the required CWO services—“the [DELETED]”—is not accounted for in RNR’s price proposal. *Protest* at 19. Alaska Weather further explains that the reasonableness of its proposed price is evident if “evaluated in light of the fact that its proposal included the [DELETED] as well as the [DELETED] weather stations. *Id.* As a result of this cost advantage, Alaska Weather maintains that its proposed price for Group 18 “will reduce the cost differential” between the Alaska Weather and the RNR offers [DELETED]. *Id.* Alaska Weather also maintains that in contrast to RNR, Alaska Weather’s proposed pricing also reflects the cost of [DELETED] at the Group 18 sites along with the cost of [DELETED] by [Alaska Weather’s] [DELETED].” *Id.*

In contrast, Alaska Weather contends that RNR’s pricing:

[DELETED]

*See Protest* at 20.

The Program Office’s Motion asserts that because Alaska Weather’s proposal was found to be technically unacceptable, its pricing proposal was never evaluated. *See Motion* at 8, *n.* 5. Nevertheless, the Program Office maintains that even “assuming arguendo, that [Alaska Weather’s] technical proposal was determined to be acceptable, [Alaska Weather’s] price proposal would not be determined to be the lowest reasonable price” for the four Alaska sites that comprise Group 18. *Id.* at 8. According to the Program Office, RNR’s technically acceptable proposal was “determined to be the lowest reasonable price in Group 18.” *Id.* As a result of RNR’s lower evaluated price, the Program Office contends that Alaska Weather lacks standing to protest the selection of RNR and the underlying proposal evaluations as it would not receive the contract award even if its protest were sustained on the other grounds.

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In its Opposition, Alaska Weather contends that:

RNR . . . . does not appear to have the lowest reasonable bid because [RNR's proposal] [DELETED].

*Opposition* at 12.

In particular, having examined RNR's pricing pursuant to the Protective Order issued in this matter, Alaska Weather reports that RNR's pricing proposal was improperly determined to be reasonable because [DELETED] at each station. *Id.* Alaska Weather further contends that RNR's price does not include [DELETED]. *Id.*

As noted above, where a party seeks summary disposition of a pending matter, the movant carries the burden of proof—and consequently, the ODRA will view the record in the light most favorable to the nonmoving party, in this case Alaska Weather. *See ODRA Procedural Regulations* at § 17.19(b); *Protest of Northrop Grumman Corporation, supra*. In this regard, the ODRA notes that: (1) Alaska Weather's price has not been evaluated; and (2) Alaska Weather's Protest has also directly challenged the adequacy and reasonableness of the RNR pricing proposal. Given these challenges, and the current posture of the case, the ODRA is unable to find as a matter of law that RNR could not be displaced by Alaska Weather in the event its Protest is sustained. The Program Office Motion therefore has not established that RNR is not an interested party. This portion of the Program Office's Motion must therefore be denied.

## V. CONCLUSION

The Program Office's Motion for Dismissal is granted in part and denied in part. Alaska Weather's challenges to the terms of the Solicitation are summarily dismissed as untimely. The remaining challenges against the technical and price evaluations of both the Alaska Weather and the RNR proposals present timely and justiciable issues that require adjudication in accordance with the ODRA's Procedural Regulations. *See* 14 C.F.R. Subpart B. The Program Office is therefore directed to file and serve

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its Response addressing Alaska Weather's technical and price evaluation challenges no later than close of business ten (10) business days after the issuance date of this decision. *See* 14 C.F.R. § 17.17(e). Alaska Weather's Comments on the Program Office Response are due no later than five business days after receipt of the Response. *See* 14 C.F.R. § 17.37(c).

\_\_\_\_\_/S/  
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